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In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM M. YOUNG AND FAITH ADAMS YOUNG,
PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902

JAMES E. FOX
Assistant General Counsel

JUSTIN M. SCHWAMM
Assistant General Counsel

WILLIAM R. CASTO, JR.
Attorney
Tennessee Valley Authority
Knoxville, Tennessee 37902

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-13) is reported at 606 F. 2d 143. The opinion of the district court (Pet. App. B-1 to B-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1979. The petition for a writ of certiorari was filed on December 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether construction by the Tennessee Valley Authority of an electric generating plant at a site outside the Tennessee River watershed is authorized by the Tennessee Valley Authority Act of 1933, 16 U.S.C. 831 *et seq.*

STATEMENT

Petitioners brought this action in the United States District Court for the Middle District of Tennessee to enjoin completion by the Tennessee Valley Authority of the Hartsville Nuclear Generating Plant. This plant is located on the Cumberland River in Tennessee, within TVA's statutorily defined power service area. 16 U.S.C. 831n-4(a). Petitioners contended, however, that Section 4(i) and (j) of the TVA Act of 1933, 16 U.S.C. 831c(i) and (j), authorizes TVA to acquire land for the construction of electric generating plants, and to construct such plants, only within the Tennessee River watershed. Because the Cumberland River is not a tributary of the Tennessee River, petitioners argued that construction of the Hartsville plant was *ultra vires* and unlawful.

The district court dismissed the complaint on the merits (Pet. App. B-1 to B-13). The court of appeals affirmed by a divided vote (Pet. App. A-1 to A-13). The court of appeals found (*id.* at A-3 to A-4) that the statutory language at issue was ambiguous, susceptible to the interpretations placed on it by both parties. It concluded (*id.* at A-5 to A-10) that TVA's reading of the provisions—according to which TVA's authority to construct electric power plants was not confined to the Tennessee River watershed—was the reasonable and correct reading, which represented a longstanding agency interpretation known to Congress. The court noted, further, that Congress had on numerous occasions funded power plant projects which it had reason to know were to be located in areas outside of the Tennessee River watershed.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with decisions of this Court or of other courts of appeals. Review by this Court is accordingly not warranted.

Section 4(i) of the TVA Act of 1933, 16 U.S.C. 831c(i), empowers TVA "to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries * * *." Section 4(j) of the Act, 16 U.S.C. 831c(j), empowers TVA "to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries * * *." As the lower courts correctly concluded, it is reasonable to read the references in these provisions to the Tennessee River and its tributaries as modifying only the immediately preceding phrases ("navigation projects" in Section 4(i) and "incidental works" in Section 4(j)), rather than the entire preceding series of phrases. That reading avoids such absurd consequences as requiring that all power houses and power structures be built *in* the Tennessee River and its tributaries and precluding TVA from acquiring land outside the Tennessee River watershed for such "other structures" as substations, power service centers, microwave relay stations, and conveyer belts, which are essential to serving the needs of TVA's statutorily defined power service area (16 U.S.C. 831n-4(a))—an area approximately twice the size of the Tennessee River watershed.

That reading is also faithful to the congressional directive in 16 U.S.C. 831dd that the Act's provisions "shall be liberally construed" to carry out its overall purposes (see *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 551 (1946)), and it reflects a policy long adhered to by TVA with the knowledge and approval of Congress.

Sections 9(a) and 14 of the Act, 16 U.S.C. 831h(a) and 831m, require TVA to file annual reports with Congress and the President concerning its activities and to include in these reports copies of all power supply contracts entered into during the year. Among the power supply contracts duly reported to Congress in the early years of the Act were TVA's first municipal power distribution contract, with Tupelo, Mississippi, and its first cooperative contract, with the Alcorn County (Mississippi) Electric Power Association (both entered into in 1934), and its contracts with its two largest municipal distributors (Memphis and Nashville, Tennessee), entered into in 1939.[1] All of these distributors are outside the Tennessee River watershed, and the contracts necessarily involved construction of substations and other power structures.

Since 1951, TVA has constructed—and now operates—four electric generating plants outside the Tennessee River watershed, and it leases a fifth with an option to purchase. Beginning in 1951 and 1953, respectively, Congress appropriated funds to TVA for construction of the Shawnee Steam Plant on the Ohio River, and the Gallatin Steam Plant on the Cumberland River, only 18 miles from the Hartsville plant at issue here. As the courts below noted (Pet. App. A-7, B-4 to B-6), the locations of these plants were discussed during the appropriations hearings, and the plant location issue was raised on the House floor during the debate on the initial appropriation for Gallatin by a member who opposed it. 98 Cong. Rec. 8477 (1952).

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[1]1935 TVA Ann. Rep. 26-27 (Alcorn County and Tupelo); 1939 TVA Ann. Rep. 343-357 (Nashville), 306-330 (Memphis).

Construction of the other two plants outside the Tennessee River watershed, and the leasing of the fifth, took place after 1959, the year in which Congress added to the Act a new section, Section 15d, 16 U.S.C. 831n-4 (Pub. L. No. 86-137, 73 Stat. 280), which authorized TVA to issue $750 million in revenue bonds to finance new power plants and other generating facilities. This legislation was enacted after hearings extending over three Congresses before the Senate and House Committees on Public Works. During these hearings a TVA witness indicated on a map to each committee the locations of TVA's plants and other facilities. *Hearings on S. 2373 Before a Subcomm. of the Senate Comm. on Public Works*, 84th Cong., 1st Sess. 68 *et seq.* (1955); *Hearings on H.R. 3460 and H.R. 3461 Before the House Comm. on Public Works*, 86th Cong., 1st Sess. 4-5 (1959). One proposed version of the legislation, S. 1855, would have prevented TVA from constructing generating plants outside the TVA power service area without prior approval of Congress. *Hearings on S. 1855, S. 1869, S. 1986 and S. 2145 Before a Subcomm. of the Senate Comm. on Public Works*, 85th Cong., 1st Sess. 1-3 (1957). Although this proposal obviously would have been less restrictive than a limitation to the watershed, it was omitted from the final bill after the Chairman of the TVA Board sent a letter to the Senate committee pointing out that such a restriction "could lead to uneconomical construction and operation" of facilities, since "[f]or example, a generating plant located near but outside the market area could prove to be the most economical location for service to this area." *Id.* at 9.

TVA began construction of the Paradise Steam Plant on the Green River, a tributary of the Ohio, in November 1959; it leased (with an option to purchase) the Allen Steam Plant on the Mississippi River in 1965; and, in 1968, it began construction of the Cumberland

Steam Plant on the Cumberland River (Pet. App. B-7, B-12 n.1). With knowledge that these projects were taking place,[2] Congress amended Section 15d of the Act on several occasions to increase the amount of bonds TVA could issue to support its power program.[3] Amendments to Section 15d in 1975 and 1979, raising the bond authority ceiling to $15 billion (Pub. L. No. 94-139, 89 Stat. 750) and $30 billion (Pub. L. No. 96-97, 93 Stat. 730) respectively, were made in response to written requests to Congress from the Chairman of the TVA Board, which explained that the additional bond authority was needed, in part, to begin and to continue construction of the Hartsville Nuclear Plant, which petitioners here maintain TVA is without authority to build. Most of the Chairman's 1979 letter requesting increased bond authority, including the portion relating to Hartsville, was reprinted in a section of the Senate Committee Report explaining the need for the legislation. S. Rep. No. 96-175, 96th Cong., 1st Sess. 4 (1979). The 1979 amendment was, moreover, enacted more than

[2]1960 TVA Ann. Rep. 10 (Paradise plant); 1965 TVA Ann. Rep. 36 (Allen plant); *Hearings on Public Works Appropriations for 1964 Before a Subcomm. of the House Comm. on Appropriations*, 88th Cong., 1st Sess., Pt. 3, 988 (1963) (Allen plant); 1968 TVA Ann. Rep. 39 (Cumberland plant). In 1970 hearings on amendments to raise the bond issue ceiling, the locations of various TVA plants outside the Tennessee River watershed were described. *Hearings on H.R. 18104 and S. 3967 Before the Subcomm. on Flood Control—Rivers and Harbors of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. 6, 18 (1970); *Hearings on H.R. 18104 and H.R. 16061 Before the Subcomm. on Flood Control of the House Comm. on Public Works*, 91st Cong., 2d Sess. 9, 23, 51 (1970).

[3]The bond authority ceiling specified in Section 15d of the Act was increased from $750 million to $1.75 billion in 1966 (Pub. L. No. 89-537, 80 Stat. 346); and it was raised to $5 billion in 1970 (Pub. L. No. 91-446, 84 Stat. 915).

a month after the court of appeals issued its decision in the present case.[4]

As this Court has repeatedly observed, courts are reluctant to overturn a long settled construction of a statute by the agency responsible for administering it. *Alaska Steamship Co.* v. *United States*, 290 U.S. 256, 262 (1933); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947). That principle is especially appropriate where the agency's construction of the provisions at issue has been brought to the attention of Congress through hearings and reports (see *Brooks* v. *Dewar*, 313 U.S. 354, 360-361 (1941)), where Congress has amended the statute a number of times but has not seen fit to alter the language so as to foreclose the agency's construction of those provisions (see *Board of Governors* v. *First Lincolnwood Corp.*, *supra*; *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 9 n.10), and where Congress has appropriated funds for projects that are authorized under the Act only if the agency's construc-

[4]TVA's authority to build generating plants outside the watershed was earlier upheld in *United States ex rel. TVA* v. *Easement and Right-of-Way, etc. (Logan County, Ky.)*, 375 F. 2d 120 (6th Cir. 1967) (Paradise Steam Plant), and *United States ex rel. TVA* v. *Puryear*, 105 F. Supp. 534 (W.D. Ky. 1952) (Shawnee Steam Plant). Both cases involved condemnations of transmission line easements, but the takings were challenged on the ground, among others, that TVA lacked authority to build the plants from which the lines extended. The holdings of these cases were reaffirmed, and TVA's authority to condemn a right-of-way for a power-related coal conveyor belt outside both the watershed and the service area was upheld, in *Illinois Cent. R.R.* v. *TVA*, 445 F. 2d 308 (6th Cir. 1971). Congress was presumably aware of the construction placed on the TVA Act by these decisions. *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-699 (1979).

tion of those provisions is correct (see *Brooks* v. *Dewar*, *supra*, 313 U.S. at 361; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, *supra*, 331 U.S. at 116). The principle is fully applicable here.

There is no merit to petitioner's contention (Pet. 8-12) that little deference is due the TVA's long established construction of the TVA Act of 1933 because it concerns the scope of the statute and was not arrived at in the course of adjudicatory, rulemaking or other regulatory proceedings. The principle of deference is not so limited. *Trafficante* v. *Metropolitan Life Insurance Co.*, *supra*; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, *supra*.

Petitioner's reliance on *TVA* v. *Hill*, 437 U.S. 153 (1978), is equally unavailing. *Hill* held that a plain and unambiguous statutory provision cannot be impliedly repealed by general, and not necessarily inconsistent, language in an appropriations act. Here, of course, the language of the statute in question is ambiguous, and the actions of Congress are consulted as aids to interpretation, not relied on as implied repealers. *Hill* also held (437 U.S. at 191-193) that views expressed in appropriations committee reports could not override the clear intent of Congress in a statute over which those committees had no jurisdiction. Here, as we have shown, the actions of the appropriations committees are consistent with the actions of the committees having authority over amendments to the basic statute whose terms are in question. In sum, the present case is clearly distinguishable from *Hill* and controlled instead by the principles established in the long line of cases cited above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority

JAMES E. FOX
Assistant General Counsel

JUSTIN M. SCHWAMM
Assistant General Counsel

WILLIAM R. CASTO, JR.
Attorney
Tennessee Valley Authority

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